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In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-47

FLORENCE DIFFENDERFER and NISHAN PAUL,
Appellants,

vs.

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED, a nonprofit Florida corporation; DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, County Manager; R. K. OVERSTREET, Tax Collector of Metropolitan Dade County, Florida; and FRED O. DICKINSON, JR., as Controller of the State of Florida,
Appellees.

On Appeal from the United States District Court for the Southern District of Florida

BRIEF OF APPELLEE CENTRAL BAPTIST CHURCH OF MIAMI

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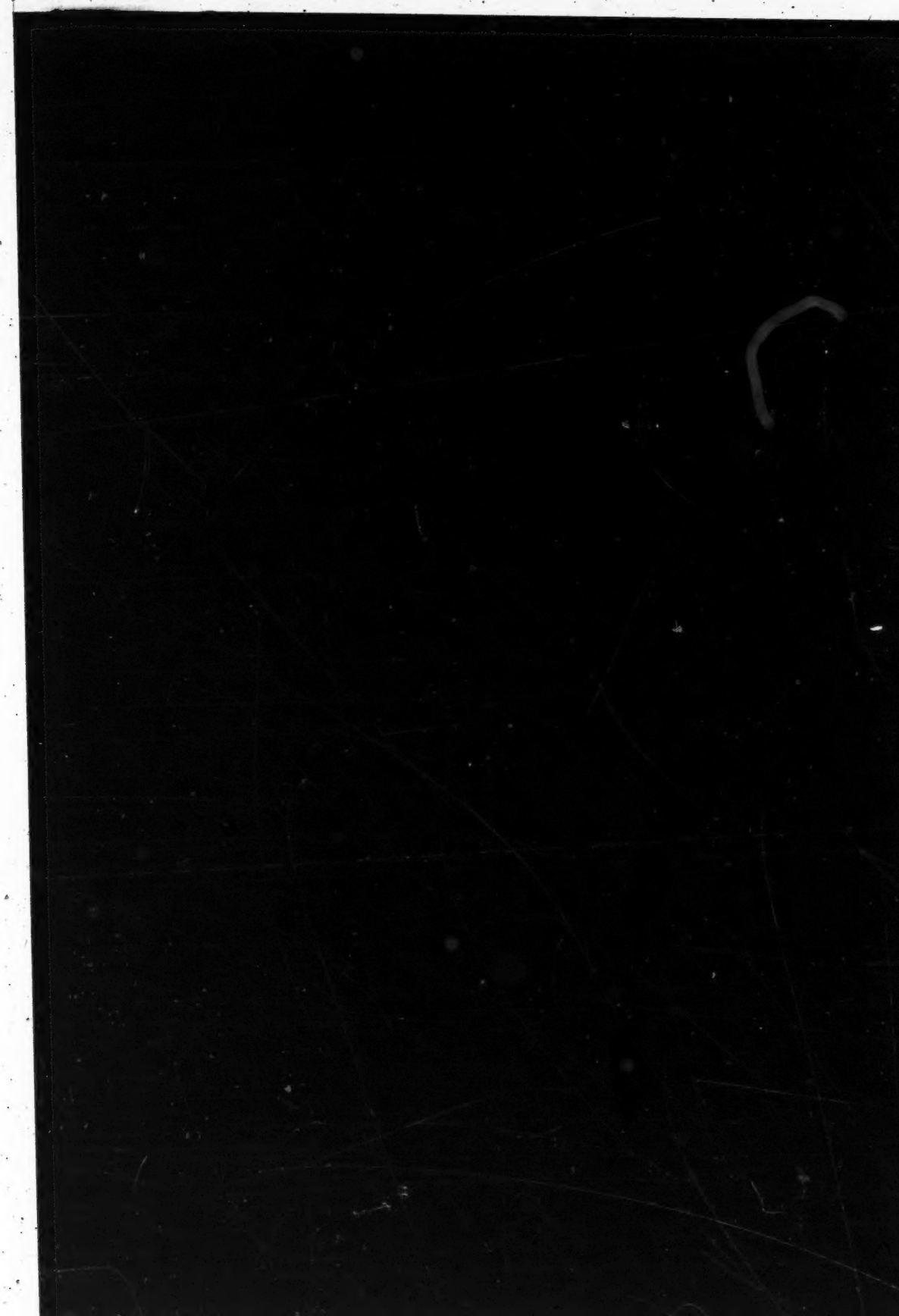

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On Appeal from the United States District Court for the Southern District of Florida

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BRIEF OF APPELLEE CENTRAL BAPTIST CHURCH OF MIAMI

INTRODUCTORY STATEMENT

As permitted by Rule 40, Section 3, this appellee adopts the statement of appellant Florence Diffenderfer with respect to the opinion of the court below, the jurisdiction of this Court, and the constitutional and statutory provisions involved. In June, 1971, pursuant to a new Florida Constitution, the State of Florida repealed the statutory provisions involved in this case and adopted new laws to govern tax exemptions of property partly used for the production of income. Accordingly, appellee inserts at this point the relevant parts of the new enactments.

A new Florida Constitution was adopted on November 5, 1968[1]; the tax exemption section of Article VII of the new Constitution states:

> "§3. Taxes — exemptions
>
> "(a) . . . . Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation."

Section 192.06(4) became §196.191(4), *Fla. Stats.* in 1969.[2] At that time, only the number designation was changed, the substance of the statutory exemption of religious property was identical to that which was before the Florida Supreme Court in a suit involving this church prop-

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[1] 25 F.S.A. 665 (1970).

[2] 10 F.S.A. 293 (1971).

erty and its exemption from ad valorem taxation.[3] The 1971 Florida Legislature changed the Florida taxation provisions, including the statute which had been §192.06(4) and §196.191(4). Chapter 71-133, 1971 Laws, Second Legislature[4] repealed §196.191 *Fla. Stats.* (1969), and made the following pertinent changes:

> §196.012 Definitions
>
> "For the purpose of this chapter the following terms are defined as follows except where the context clearly indicates otherwise:
>
> (1) Exempt use of property means predominant or exclusive use of property for educational, literary, scientific, religious, charitable or governmental use as defined in this act.
>
> (2) Exclusive use of property means property that is used one hundred per-cent (100%) for exempt purposes. Such purposes may include more than one class of exempt use.
>
> (3) Predominant use of property means property used for exempt purposes in excess of fifty percent (50%) but less than exclusive.
>
> * * *
>
> §196.192 Exemptions from ad valorem taxation.
>
> (1) All property used exclusively for exempt purposes shall be totally exempt from ad valorem taxation.

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[3] *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (Fla. 1968).

[4] West's Florida Session Law Service 362-370 (1971).

(2) All property used predominantly for exempt purposes shall be exempted from ad valorem taxation to the extent of the ratio that such predominant use bears to the non-exempt use.

§192.196 Criteria for determining that portion of charitable, religious, scientific or literary property entitled to exempt status

In determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable, religious, scientific, or literary purpose, the following criteria shall be applied:

(1) The nature and extent of the charitable, religious, scientific or literary activity of the applicant, a comparison of such activities with all other activities of the organization, and the utilization of the property for charitable, religious, scientific or literary activities as compared with other uses.

(2) The extent to which the property has been made available to groups who perform exempt purposes, at a charge that is equal to or less than the cost of providing the facilities for their use, or the extent to which services are provided to persons at a charge that is equal or less than the cost of providing such services. Such rental or service shall be considered as part of the exempt purposes of the applicant. Only those portions of property used predominantly for charitable, religious, scientific or literary purposes shall be exempt. In no event shall an in-

cidental use of property either qualify such property for an exemption or impair the exemption of an otherwise exempt property.

* * *

As a result of these changes in the Florida statutes, appellee believes that this case has become moot.

Whether this case is moot or not, appellee totally rejects appellants' statements of both the "facts" and the "questions" in this case. On the whole, appellants' statements are cast as though the exemption here in question were special to churches, and as though the property involved were office buildings or other property, blocks removed from the Church and not used at all for church functions. In point of fact, as appellee will develop in detail below, the exemption at issue in this case was common to all charitable nonprofit organizations in the State of Florida. The property involved is a parking area that is both contiguous with the Church and a functional, physical, essential and necessary part of the over-all facilities of the Church. Accordingly, appellee finds it necessary to restate the Questions Presented and the Statement of the Case.

QUESTIONS PRESENTED

1. Is a case mooted by repeal of the state statute which is the subject of constitutional attack?

2. May a State, consistently with the First and Fourteenth Amendments, include churches on an equal footing with other charitable nonprofit organizations in the general category of tax exempt organizations?

3. May a State, consistently with the First and Fourteenth Amendments, exempt from ad valorem taxes the property of charitable nonprofit organizations, including churches, that is both (1) indispensable and primarily used, every day and every evening throughout the week, for the accomplishment of their exempt purposes, and (2) partially used during the business hours of the week, to the extent that it is not needed for exempt purposes, for the production of income to be used for exempt purposes?

STATEMENT OF THE CASE

The Jurisdictional Statement and the Briefs of both appellants contain numerous, and seriously prejudicial, misstatements of fact. Apparently, appellants feel that no weight is to be attached to the decision of the Supreme Court of Florida in *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (1968). This decision was based on the absolute necessity of the parking area, and its actual dominant use for the church functions of appellee. More importantly, appellants almost totally disregard the Stipulation of Facts which they agreed to in the Federal District Court in this case. Appellants are free to challenge the constitutionality of the exemption here in question. They are not free to contradict their Stipulation.

For example, appellants say four times in their Jurisdictional Statement that the parking area was used six days and six evenings a week for commercial purposes. They also say that the stipulated facts included the use of the parking area "six days and six nights each week

for a commercial profit-making purpose, as recognized in the opinion of the three-judge United States District Court" (p. 4).

In point of fact, there was no such stipulation, nor did the three-judge court below recognize any such stipulation. The principal facts stipulated with respect to the *use* of the parking lot are set out immediately below. Emphasis has been supplied where necessary. (The Stipulation of Facts is reprinted in full as Appendix B to appellee's Motion to Dismiss or Affirm; page references are to this appendix, as "Motion App.")

> . . . *All of this property* is being used by the Church in the conduct of and for the purpose of furthering its religious, educational, literary, benevolent, fraternal, and/or charitable activities. (Motion App. 3)
>
> The Church is located in the heart of a great metropolitan area, and is required to maintain the PARKING AREA for the use of its congregation due to the inadequacy of on-street and off-street parking facilities in the vicinity. When the PARKING AREA is not so used, this being during the *week-day business hours*, parking facilities in the vicinity are greatly needed by the general public. *Part of this parking space is used every day of the week* by people attending Church and Church functions and meetings, but rather than permit *that portion not so used* to lie vacant when unused by church people, the Church rents the PARKING AREA to the public charging reasonable rental fees therefor. (Motion App. 5)

The area of the off-street parking spaces for which the Church makes charges on week-days is less than 75% of the total of the real property owned by the Church in the city block, and is an integral and functional and physical part thereof, and is an indispensable and essential Church property used by the Church solely and exclusively in furtherance of the religious, educational, literary, benevolent, fraternal and charitable purposes and objects . . . . (Motion App. 7-8)

The Church never has made, and does not make, any charge of any kind for any of its off-street parking spaces used at any time for any purpose stated in any of the foregoing paragraphs numbered (i) to (xxvi), inclusive [a list of the Church functions, and the times they occur, for which the parking lot is used], and has made, and now makes, charges only on week-days (Monday through Saturday) for such of its off-street parking spaces *as are not in use for any of these purposes.* (Motion App. 11)

As admitted in the Supreme Court of Florida, *this Church could not operate in this location without these parking spaces.* They are just as necessary for the operation of the Church as the roof over the Church Building. In the argument, the following conversation took place:

Q. (Justice Drew, from the bench, asked the attorney for the County), "Mr. Simon, could this Church operate in its present locality without these parking spaces?"

A. "No, Your Honor, it could not."

Q. "Mr. Simon, aren't these parking spaces just as necessary for the operation of this Church as the roof over the building itself?"
A. "Yes, Your Honor, they are." (Motion App. 11-12)

Despite these stipulations by the appellants in the court below, appellants somehow feel free in this Court to caricature the parking lot as simply a "church-owned commercial enterprise." They feel free to put in the Stipulation things that are not there (night-time rental of the lot) and to leave out things that are there (necessity and dominant use for church functions; weekday, as well as evening and Sunday use for church services and meetings).

Stipulations play a vital role in shortening the fact-finding process at the trial level. If appellants are free to do what they have attempted to do in this case, the value of stipulations will be destroyed. Appellants must be held to what they have stipulated and must be confined to argument of the only issues really presented by the stipulated facts.

A full statement of the relevant facts of this case would require repetition at this point of all the facts stipulated between the parties. In the interest of brevity, appellee respectfully draws the attention of this Court to the Stipulation of Facts (Appendix B in appellee's Motion to Dismiss or Affirm). There the story of the present use of the parking lot is fully and fairly told.

The Court, however, may be interested in how and why the parking lot came into existence, and why it is so necessary for the functioning of the Church. The heart

of the answers to these questions is contained in the following statement by the Supreme Court of Florida in *Central Baptist Church v. Dade County*, 216 So.2d 4, 5 (1968):

> In respect to the practical problems and necessities involved, the Appellant church congregation made an evidentiary showing that as its congregation grew it was necessary over the past several years for it to acquire with church funds additional lots in the block where its church building is situated for its congregants' car parking. (Reprinted in Appellants' Jurisdictional Statement, App. 14)

The "evidentiary showing" to which the Supreme Court of Florida refers in this passage was an affidavit made by Miller Walton, Esq., chairman of the Finance Committee of the Central Baptist Church. This affidavit is printed as Appendix A to this brief.

According to the United States Census Bureau, Dade County had a 1930 population of 131,268. (The church was built in 1928.) In 1970 the population was 1,267,792, almost ten times greater. Throughout this period the Central Baptist Church has been at its present location. The neighborhood, however, has changed dramatically. It is now in the heart of the downtown Miami business area.

In 1936, when the Church was incorporated, it did not own any of the real property involved in this litigation (Appendix A, *infra*, pp. 2, 10.) At that time, many people walked to the Church, others drove automobiles, and off-

street parking was no problem. By 1940, however, it had become imperative for the Church, in order to survive, to provide some additional off-street parking area. Accordingly, the congregation purchased Lots 6 and 7 (see the map at App. 12 in appellee's Motion to Dismiss or Affirm) and donated them to the Church.

After World War II ended, and automobiles and gasoline again became available to the public, the Church found it necessary to provide still more parking facilities. The situation became particularly acute when the Church constructed its Sunday School Educational Building on land which had previously been used, in part, for parking. Meantime the business growth of the surrounding area made it increasingly difficult for members of the Church to find on-street parking spaces. By 1950 it had become imperative for the Church, if it was to survive, to enlarge the off-street parking area to the greatest extent possible and as rapidly as possible. (Appendix A, *infra*, pp. 12-13.)

Accordingly, between 1950 and 1959 the Church acquired the rest of the parking lot area whose exemption is contested in this case. This provided the Church with a total of 290 parking spaces. Even this, however, has become totally insufficient for the needs of the congregation and of others who attend the services, functions and meetings at the Church. Most of these people reside from 5 to 15 miles from the Church throughout Dade County. Public transportation is utterly inadequate as a means of travel to or from the Church. When people want to come to the Church, they have to have a place to park their automobiles; otherwise they cannot come. (Appendix A, *infra*, p. 6.)

Since 290 spaces are not nearly enough, the Church has arranged for the use on Sundays of a large number of commercial off-street parking facilities in the immediate neighborhood of the Church. These facilities are made available, without any charge, for persons attending services and functions at the Church. (Appendix A, *infra* p. 15.)

The auditorium of the Church has a seating capacity of approximately 2200. If the congregation should attempt, at this time, to build a church of comparable size on any other property in the City of Miami, except within the C-3 (Central Commercial) District, City Ordinance 6871 would require the congregation to provide 440 off-street parking spaces. If a new church were built in the unincorporated area of the county, the Code of Metropolitan Dade County § 33-124(d) would require the congregation to provide 550 off-street parking spaces. (Appendix A, *infra*, p. 16)

So far, therefore, from being a parking lot that the Church exploits commercially, the parking area in this case is not even big enough for the Church's own needs. Parking spaces are rented to the public only during weekday business hours, and then only to the extent that such rental does not deprive the Church of the parking facilities it needs every day and every evening of the week. (Motion App., supra, pp. 5, 8, 9, 10).

This summary of the facts about the origin, use and necessity of the parking lot, as established by the stipulation of the appellants and the decisions of the Supreme Court of Florida in the *Dade County* case and of the

Federal District Court below, make one point incontestably clear: the primary purpose and dominant, indispensable use of the parking lot involved in this case is, throughout the week, for the services, functions and meetings of the Central Baptist Church of Miami.

Finally, in order to correct any possible misapprehension by this Court, appellee finds it necessary to enter a formal denial of Mr. Salisbury's statement in the POAU brief *amicus* (supporting the appellants) that the Central Baptist Church of Miami is a "supporting member of Americans United". (Brief of Protestants and Other Americans United for Separation of Church and State as *Amicus Curiae*, p. 4). Even if true, of course, the statement would not change the law in this case. The Central Baptist Church, however, is not a member of that organization and never has been. Prior to 1969, appellee did contribute $100 each year for a few years, but it has contributed nothing since that time. Such contributions, needless to say, did not make appellee a member of POAU any more than a contribution by John Smith in New York to the YMCA in Miami would make him a member of the Miami YMCA.

SUMMARY OF THE ARGUMENT

The real facts and questions in this case have been stated. The constitutional argument revolves around those facts and questions. Fortunately for the appellee, two of the basic premises involved are already resolved. One is of fact, the other of law.

1. *Fact.* The Church could not operate without this parking area. It is as necessary as the roof over the building itself.

2. *Law.* This Court held, in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), that ad valorem tax exemption of church property used for a house of worship does not constitute an establishment of religion, or prohibit the free exercise thereof.

It follows that if this parking area were not rented at all to the public, there could be no question of the constitutionality of the tax exemption here at issue. Florida is far from the only jurisdiction to recognize the necessity of parking facilities for churches, especially in congested metropolitan areas. See, for example, *Immanuel Presbyterian Church* v. *Payne*, 55 Cal.App. 1125, 265 P. 547 (1928); *Congregation B'nai Yisroel* v. *Township of Millburn*, 35 N.J.Super. 67, 113 A.2d 182 (1955). Although some States have a more restrictive policy (see *Congregational Union* v. *Zangerle*, 138 Ohio St. 246, 34 N.E.2d 201 [1941]), the difference is to be explained in terms of State constitutional and statutory provisions, not requirements of the federal Constitution. *Walz* is controlling on the federal issue; and, under *Walz*, property that is essential for a house of worship may constitutionally be exempted from ad valorem taxes.

If the present case can be distinguished from *Walz*, the only basis for distinction is that some of the parking spaces that are not needed for church functions during weekday business hours are rented to the public. Until repeal of the statutes involved in this case, the State of Florida, following the "incidental use" doctrine with

respect to former F.S.A. § 192.06(4), held that such partial, incidental use of the parking lot did not result in loss of the ad valorem exemption. As the Supreme Court of Florida explained when Dade County tried to tax the parking lot:

> We further find that the limited part-time rental of a portion of the church lot for commercial parking in week day business hours is reasonably incidental to the primary use of the church property as a whole for church or religious purposes and not a sufficiently divergent commercial use that eliminates the exemption as to the commercial parking lot portion of the property.

Central Baptist Church v. *Dade County*, 216 So.2d 4, 6 (1968).

In reaching this decision, the Supreme Court of Florida was greatly influenced by former F.S.A. § 192.06(3), which permitted charitable nonprofit organizations (other than churches) to rent out not more than 75% of their home facilities without loss of the ad valorem exemption, providing that the rental income was used for the exempt purposes of the charitable organizations. The Supreme Court of Florida judged that "equitable principles" made it difficult to accord different exemption treatment to churches from that accorded to other charitable nonprofit organizations. 216 So.2d at 7.

The question before this Court, of course, is not equity but constitutionality. Put one way, the issue might read: "Is the incidental use doctrine constitutional as applied to church property in common with other

charitable nonprofit organizations?" Looked at in a somewhat broader view, the case might be seen as involving the constitutionality of the "destination principle," since Florida required exempt organizations to use the rental income for their exempt purposes.

Concentration, however, on the "income-producing" aspect of the parking area tends to obscure a much more fundamental issue. In the *Dade County* decision, the Supreme Court of Florida held that churches, both because of the "incidental use" doctrine and because of equitable considerations, were entitled to the same tax exemption treatment under Florida law as other charitable nonprofit organizations. The fundamental constitutional question in this case, therefore, is whether a State is free to include churches within the general category of charitable nonprofit organizations for tax exemption purposes and to apply to them, as part of that class, the same rules about "incidental" or "income-producing" use that it applies to the entire class.

Walz v. *Tax Commission*, 397 U.S. 664 (1970), does not answer this question explicitly, but it leaves only one answer possible: Yes. *Walz* does not answer the question explicitly, because the plaintiff focused his attack, and this Court focused its consideration, on an exemption of property used for absolutely no other purpose than a house of worship as the supreme example of forbidden governmental aid to religion. This Court recognized that churches use their property for other community functions besides religious worship, but refused to ground the constitutionality of the exemption on the public welfare services that churches perform. 397 U.S. at 674.

Walz rests squarely on the twin pillars of history and "benevolent neutrality." This Court based its decision sustaining the constitutionality of the exemption of the sanctuary on (1) the antiquity and universality of the exemption in American law and (2) our constitutional heritage of a public policy of "benevolent neutrality" towards churches and religious exercises, so long as there is neither preference of, nor interference with, religion.

Giving churches the same exemptions accorded to other charitable nonprofit organizations is fully in accord with this policy of "benevolent neutrality," as shown by the universal practice of the States and the Federal Government in this regard. If this case involved a tax exemption given only to churches, different constitutional questions would come into play, just as the constitutional problem would be different if churches were denied a tax exemption given to all other charitable nonprofit organizations. But the exemption here in question is solidly in the stream of American tax exemption history — it is common to churches and all other charitable nonprofit organizations.

Walz did not say, and appellee does not suggest, that churches *must* be treated in all respects, including taxation and exemption, exactly like other charitable nonprofit organizations. Such a doctrine might well be pernicious, obliterating as it would the special status given religion and religious organizations by the First and Fourteenth Amendments. The free exercise of religion cannot be taxed. See *Jones* v. *Opelika*, 316 U.S. 584 (1942), *reversed on rehearing*, 319 U.S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). Moreover, the First and Fourteenth

Amendment prohibition against "excessive entanglement" of the government with religious affairs might well necessitate, or at least justify, special tax provisions for churches in certain instances. See, for example, the special auditing and financial reporting provisions that Congress has enacted for churches in the Internal Revenue Code of 1954, §§ 6033(a)(2), 6043(b), and 7605(c) as amended. Still other considerations might justify subdividing exempt organizations, including churches, into various classes, with different degrees of tax relief for each. See, for example, the Internal Revenue Code of 1954, §§ 170(b)-(1)(A), 508(c)(1) and 512(b)(16), as amended.

There is no question, however, in the present case of what a State *has* to do, or of any preference of, discrimination against, or entanglement with religion. The State of Florida has chosen (and still chooses, in the amended form of the statutes involved in this case) to treat churches, with respect to ad valorem tax exemptions, exactly the same way it treats other charitable nonprofit organizations. The permissibility of such a policy is the only issue in this case.

Appellants assert that there is no history to support the tax exemption of "church-owned commercial enterprises." If they are talking about ad valorem taxes and a church-owned girdle factory, they are right. If they are talking about the Central Baptist Church parking area, they are completely wrong. Every State and Territory in the country follows some version of the "incidental use" doctrine. Exempt organizations, including churches, are permitted to conduct a wide variety of fund-raising operations, with a more or less commercial flavor, on the

premises of their home facilities. There is no rule that to be exempt, charitable organizations must derive all their income from gifts. They must be *nonprofit*, not *nonproductive*.

The State of Florida has simply differed from most other American jurisdictions by permitting exempt organizations to derive rental income as well as traditional forms of non-donated income from use of their home facilities without loss of the ad valorem exemption. Now Florida has joined the other States by adopting a policy of partial or total ad valorem taxation of income-producing real estate. The fact that Florida has changed its policy does not mean that its former course of action was unconstitutional.

If the parking area cannot be rented at all without constitutional cancellation of the exemption, it is impossible to see why the same forfeiture must not follow upon the use of exempt facilities for dinners, picnics, bazaars and other social functions to which the public is invited and for which a charge is made. Churches, in particular, despite their traditional function as the "Meeting-Houses" of 18th and 19th-century America (a function they still perform in many parts of the country), will no longer be able to rent their facilities to such community groups as the Boy Scouts. If the line is drawn at "rental for profit," rather than mere "rental," the States will inevitably become deeply entangled in church finances. If the "rental" doctrine is pushed to its logical extreme — as it never has been in any State or Territory — even pew rents and payments for synagogue seats during the High Holiday Services will become constitutionally suspect.

Appellants ask this Court to declare tax exemptions for "church-owned commercial enterprises" unconstitutional. Again, if appellants are talking about church-owned factories or mercantile establishments, that is not this case. Appellants have chosen the wrong defendant. If appellants *are* talking about this case, they are asking this Court to lay down a doctrine absolutely novel in American law and flatly rejected by every American jurisdiction throughout our history. *Some* income-producing use of the home facilities of charitable nonprofit organizations, including churches, has always been permitted by State and Federal law.

The history of tax exemptions for churches has been singularly devoid of that "political divisiveness" which the First Amendment was designed to prevent. This is shown by the fact that *all* churches benefit from the exemptions, and that *all* jurisdictions have followed the same basic policy.

In addition to their No Establishment claim, appellants also raise Free Exercise and Equal Protection issues. They have, however, shown absolutely no coercive effect of the Florida tax exemption on the practice of their own religion. Accordingly, their Free Exercise claim is frivolous. With respect to the Equal Protection Clause, appellants have no standing to raise the question of unfair competition by appellee with commercial parking lot operators. Significantly, appellants made no effort, or were unable, to find a commercial establishment that felt it was being unfairly competed against. More importantly, if there is an Equal Protection issue in this case, it is on appellee's side rather than appellants. Churches cannot be excluded from the general category of charitable nonprofit

organizations without a compelling governmental interest. Any other doctrine would violate the free exercise of religion.

Finally, appellee believes that this case has become moot as a result of Florida's change of its statutes. Accordingly, it is not necessary for the Court to reach the constitutional issue. This case should be dismissed as moot.

ARGUMENT

I. *A Case is Mooted by Repeal of the State Statute Which is the Subject of Constitutional Attack*

In their Jurisdictional Statement, as well as in their briefs, appellants state that their constitutional claim is directed against former *Florida Statute* §192.06. (Jurisdictional Statement p. 3; Nishan Paul's Brief p. 2; Florence Diffenderfer's Brief p. 4) Appellants both state that they attack the Florida Supreme Court's interpretation of that particular statute with reference to this particular piece of property.[5]

It has been asserted throughout this case by plaintiff-appellants that a constitutional controversy was presented by the undisputed facts because the Florida Supreme Court has specifically held this property entitled to exemption under *Fla. Stats.* §192.06, notwithstanding an incidental use which produces income. The Florida statute in question

[5]*Central Baptist Church of Miami v. Dade Co., supra.*

no longer exists. There is now no relief which this court can grant — the statute can't be struck down because it no longer is in force — and thus there is no constitutional case or controversy before this Court. Appellants would have this Court invalidate §192.06, *Fla. Stats.* as applied by the Florida Supreme Court[6], but no such statute remains in the jurisprudence of Florida. Instead, there is an entirely new statutory exemption scheme which deals specifically with the aspect of this property's use of which appellants complain.

Under the new statutes, property may be exempt by reason of its *exclusive* use or its *predominant* use. [§196.012, *Fla. Stats.* (1971)]. When property is used for an exempt purpose, but not exclusively, it is exempt *only to the extent of its exempt use.* [§196.192 *Fla. Stats.* (1971)] Thus, under the new Florida exemption statutes, the Church's parking area is not necessarily exempt to the extent that it is used for non-exempt purposes.

It is not known how the County taxing authorities will apply this new statutory exemption provision to the Church's property. It is certainly possible that the taxing authority will take the position that, under the new statutes, the parking area is not exempt to the extent that it is used for rental purposes. In that event, appellants' theory before this Court would present only a hypothetical and academic issue; it would not present a genuine, present case or controversy necessary for constitutional adjudication. Lengthy argument and citation is not necessary for the proposition that when a statute under attack is re-

[6]Nishan Paul's Brief p. 2; Florence Diffenderfer's Brief p. 2-3.

pealed after the lower court's decision, no case or controversy remains for this Court to decide. *Bryan v. Austin*, 354 U.S. 933 (1957), disposing of an appeal without reviewing the lower court's decision because the state statute involved had been repealed; *Cf., Daniel v. Goliday*, 398 U.S. 73 (1970). The proposition is recognized by courts in this nation generally. 5 Am. Jur.2d 205 (App. & Error §763); *Johnson v. George*, 119 Colo. 153, 200 P.2d 931 (1948); *Robinson v. Robins Dry Dock & Repair Co.*, 238 N.Y. 271, 144 N.E. 579, *error dismissed* 271 U.S. 649 (1926).

Since this is not a case in which the taxing authority is attacking the exemption, there is not even remaining the issue of taxability for prior years. The County has not undertaken to tax the Church's property since the Florida Supreme Court's decision, and under Florida law the taxing authority could not attempt to back-tax the property even if this Court held that §192.06(4) was unconstitutional during its period of enactment. *Coppack v. Blount*, 145 So.2d 279 (Fla.App.3d 1962). Having once made the judgment not to tax property, the local taxing authority may not "change its mind" at a later date. See, *City of Naples v. Conboy*, 182 So.2d 412, 418 (Fla. 1965). Appellants' standing to raise this issue has been as taxpayers; their only claim for relief has been for declaration of invalidity of the now-repealed §192.06(4). There is no claim by the local taxing authorities for taxes allegedly due and owing during the existence of §192.06(4), and the local taxing authorities could not back-tax for the years of the statute's viability even if the statute were declared unconstitutional. Under Florida law, they are estopped from doing so. It follows, therefore, that this case is moot. The statute under attack has been repealed, the statute

which has taken its place is materially different; it deals directly with exempt property which is used for exempt purposes only a portion of the time. It is not known how Florida courts will apply this new statute to the subject property, certainly this case does not present any basis for judging the new statutory system. This appeal should be dismissed because the issues it presented have become moot.

II. *Appellants Have Misconceived the Constitutional Issue.*

With regard to the merits of this case, appellants rely on the No Establishment, Free Exercise and Equal Protection Clauses of the First and Fourteenth Amendments. The No Establishment Clause, however, is the heart of the appellants' case. If they cannot prevail on that issue, their attack must fail. The Free Exercise and Equal Protection claims are clearly without merit. Appellants' No Establishment attack rests on two fundamental misconceptions of American law. The first has to do with the "no aid, no hurt" doctrine of the *Everson* case and subsequent decisions by this Court. The second misconception is perhaps even more basic. It has to do with the nature of an "exemption" and its effect on the distribution of the tax burden. See Bittker, "Churches, Taxes and the Constitution," 78 *Yale Law Journal.* 1285 (1969)

As Professor Bittker shows, constitutional attacks on tax exemptions of churches rest on unarticulated and unexamined assumptions about the nature of "Exemptions" and their relationship to the tax base, allowable deductions and credits, the rates involved, and the multiplicity

of taxes. Judging by the standard of thoughtful tax analysis, Appellants' attack in this case is simplistic to the point of irrelevance. It is, however, unnecessary for the resolution of this case that the Court should become embroiled in constructing a general theory of "fair" taxation. Sticking to the facts of this case, and the only issues genuinely raised thereby, the Court can easily determine that the Appellants' No Establishment claim is without merit.

Appellants have presented this case to the Court as though it involved (1) a commercial business owned by a church but wholly distinct from the charitable and religious functions of the church and (2) a special tax exemption for such a church-owned commercial enterprise. Appellants' briefs read like attacks on former §511 of the Internal Revenue Code of 1954. Congress amended this section by the Tax Reform Act of 1969 in order to terminate the exemption of churches and certain other exempt organizations from the tax on unrelated business income.

The termination of that special exemption was requested, and fully supported, by the major religious groups in the United States. See, for example, the *Joint Statement* of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)*, before the Senate Committee on Finance, 91st Congress, 1st Sess. 83 (May 2, 1969).

The former § 511 type of exemption, however, is not involved in this case. We are not dealing with a parking area a mile away from the church, operated solely for commercial purposes, and wholly unrelated to the functions of the church except through the production of income. Neither are we dealing with an exemption like

former § 511 that was given to churches and certain other types of exempt organizations but not to exempt organizations generally. The exemption claimed by the Central Baptist Church of Miami in this case was available, before its repeal, to all "educational, literary, benevolent, fraternal, charitable and scientific institutions" in the State of Florida. *Fla. Stats.* § 192.06, as interpreted by the Supreme Court of Florida in *Central Baptist Church of Miami v. Dade County*, 216 So.2d 4 (1968).

These distinctions are crucial to a proper understanding of this case. The constitutional issues involved in former § 511 are quite different from those involved in this case. For example, former § 511 involves the degree of discretion that Congress constitutionally enjoys to exempt purely commercial property from taxation. That Congress has considerable discretion in this area is not open to doubt, in view of many prior decisions of this Court; but the discretion cannot be pushed to the point of absolute arbitrariness. Moreover, former § 511, like certain other provisions of the Internal Revenue Code still in existence (notably §§ 170 and 501-3), directly involves the "destination principle" of income taxation, under which income that would otherwise be taxed is not taxed because devoted to exempt purposes. See 12 Mertens, *Law of Federal Income Taxation* §34.14. The "destination principle" is somewhat involved in the present case; but in comparison with the provisions of the Internal Revenue Code, the Florida exemption here in question is only the tail on the elephant. It would clearly be inappropriate for this Court to make a major decision, one way or the other, on the "destination principle" in this case, where neither the history nor the actual provisions of the Internal Revenue Code are directly relevant.

Finally, former § 511 was a special exemption for churches and certain other classes of exempt organizations. It was not shared by the general class of charitable nonprofit organizations, and notably not by § 501(c)(3) organizations, which include schools, colleges, hospitals and many other types of charitable nonprofit institutions. The opposition of most American churches to former § 511 was based as much on its *special* as on its *commercial* character. Church statements opposing former § 511 cannot fairly be applied to the type of property and the type of exemption involved in this case.

The "commercial enterprise" here in issue was simply the renting during weekday business hours of *part* of a church parking area that was, and is, absolutely essential to the charitable and religious functioning of the church. Spaces were rented to the public only during the periods, and only to the extent, that use of the parking area by the congregation was not necessary for church functions.

There is a shortage of parking in downtown Miami, as appellant Nishan Paul concedes (Brief on the Merits, p. 15). The Central Baptist Church made its surplus parking facilities available to the public during weekday business hours. This was a convenience for the people of downtown Miami, especially those who work at the nearby Federal courthouse and post office.

That the Church should have charged the public a rental fee for parking is hardly unreasonable. The Church, however, never operated the parking area as a real business. The Church maintained no separate income-and-expense books for the parking area. The congregation paid the expenses of maintaining the parking lot out of its general budget, and devoted the entire rental income

to the accomplishment of church purposes. In the light of these facts, the Central Baptist Church of Miami was hardly a financial tycoon, out to manipulate a tax exemption into a parking lot empire. If ecclesiastical entrepreneurs are to be found, they must be found elsewhere.

Put one way, the issue in this case might be stated as the constitutionality of the "incidental use" doctrine as applied to church property in common with the property of other charitable nonprofit organizations. Looked at another way, the issue might be stated as the constitutionality of the "destination principle" as applied to ad valorem exemptions of property producing incidental rental income for charitable nonprofit organizations, including churches.

Both of these statements of the issue, however, obscure the most fundamental constitutional question in this case: the permissibility of parity of exemption treatment for churches and other charitable nonprofit organizations. Accordingly, the constitutional question in this case is not "whether a State can exempt church-owned commercial enterprises," but whether, consistently with the First and Fourteenth Amendments, a State may:

(1) include churches on an equal footing with other charitable nonprofit organizations in the general category of tax exempt organizations?

(2) exempt from ad valorem taxes the property of charitable nonprofit organizations, including churches, that is both (a) indispensable and primarily used, throughout the week, for the accomplishment of their exempt purposes, and (b) partially used during the business week, to the extent that it is not needed for exempt purposes, for the production of income to be used for exempt purposes?

III. *The Structure of American Tax Exemptions*

Before proceeding to a direct consideration of the constitutional issues presented by this case, appellee must correct a serious misunderstanding by appellants of American tax exemptions. The gist of appellants' case is the assertion, wholly unsupported in American law, that Florida does not tax church-owned commercial enterprises, that the other 49 States and the Federal Government do, and therefore that the Florida exemption here in question is unconstitutional.

The actual fact of the matter is that every American jurisdiction permits *some* income-producing use of the "home facility" of a charitable nonprofit organization without loss of the ad valorem tax exemption. What American law, including that of Florida, has always done is to divide the property of exempt organizations (including churches) into three categories:

(1) property actually used only for exempt purposes;

(2) property not used at all for exempt purposes (other than for the production of income to be used for exempt purposes);

(3) property used primarily for exempt purposes and incidentally for the production of income to be used for exempt purposes.

The first category of property (that used only for exempt purposes) is uniformly exempt from ad valorem taxation, providing that the property is owned as well as

used by exempt organizations. 84 C.J.S. § 282(e)(1). The second category of property (that not used at all for exempt purposes, other than the production of income) is uniformly taxed in all 50 States, including Florida, and in the District of Columbia. The third category of property (primarily used for exempt purposes and incidentally used for the production of income) is neither uniformly taxed nor uniformly exempted. 34 A.L.R. 634, 659-77 (1925), 62 A.L.R. 328, 334-39 (1929), 108 A.L.R. 284, 292-97 (1937), 168 A.L.R. 1222, 1233-58 (1947); 75 ALR 2nd 1106 (1961); 33 ALR 3rd 938 (1970); 37 ALR 3rd 1191 (1971); 39 ALR 3rd 640 (1971); 84 C.J.S. §§ 282(g)(4), 291(b)(3)(a), (b), (e); Van Alstyne, "Tax Exemption of Church Property," 20 *Ohio State Law Review* 461, 467-68, 472, 500-503, 506-7 1959); Note, "Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes," 64 *Harvard Law Review* 288, 294-99 (1950); Bennett, "Real Property Tax Exemptions of Non-Profit Organization," 16 *Cleveland Marshall Law Review* 150 (1967)

The parking area of the Central Baptist Church of Miami fits precisely into this third category of property. It is indispensable and primarily used every day and night of the week for church functions. During the weekday business hours some of the parking lot area is not necessary for church functions and is rented to the public.

Throughout our history as a nation, different States have devised different rules for determining the taxability or exemption of such property. In every State, however, and in the District of Columbia, as common knowledge and the authorities cited above demonstrate, *some* incidental income-producing use of the indispensable "home

facilities" of exempt organizations has been permitted without loss of the ad valorem exemption. Churches, schools, hospitals and orphanages, for example, do not lose their ad valorem exemptions by holding bazaars, dinners, picnics and other social functions to which the public is invited and for which a charge is made. The collection of pew-rents does not forfeit a church's or a synagogue's exemption. A church can rent its facilities for Boy Scout or other community-type meetings in many jurisdictions without losing its tax exemption. Indeed, in early New England days, the church was often known simply as the "Meeting House." Cf. Van Alstyne, *art. cit. supra*, p. 468.

Appellants seem to think that the production of income is fatal to the constitutionality of tax exemptions, at least with respect to churches. That is a fundamental misconception of what a tax exemption is all about. Exemptions are not given to organizations because they are *nonproductive;* they are given because the organizations are *nonprofit* and *charitable.* The legislature is under no obligation to tax all productive property; otherwise, the legislature could not exempt, or give other highly favorable tax treatment to, oil wells, new factories or low-income housing projects. Hospitals, schools, colleges, universities, cemeteries, museums, centers for the performing arts, cooperatives of many types, and a wide variety of other exempt organizations are allowed to charge fees for their services without loss of their tax-exempt status. 84 C.J.S. § 282(b)(4)(b). There is not, and never has been, a rule that tax-exempt organizations must derive all their income from gifts. Appellants have shown no persuasive reason, historical or otherwise, for imposing a different rule on churches than that generally applied to charitable nonprofit organizations.

Florida, therefore, so far from being the only State to allow an exemption when there has been *some* income-producing use of the indispensable "home facility" of an exempt organization, has simply followed a rule with respect to incidental rental income that is different from that followed by most other States. With the recent repeal of the 75% rule involved in this case, and the substitution of a proportional taxing schedule coupled with a minimum requirement of more than 50% use of the property for exempt purposes, Florida has now elected to join the company of those States that follow a "partial exemption" policy.

As already noted, appellants' fundamental misconception of American tax law, including that of the State of Florida, leads them to treat this case as though it involved a special exemption for church-owned commercial enterprises. If intentional, this would have been a ridiculous misstatement of the case. No special exemption for churches is involved. Churches participate in the exemption only as members of the general class of exempt organizations. No exemption of "unrelated commercial enterprises" is involved. The only property entitled to the exemption is property that is necessary and primarily used for the accomplishment of exempt purposes.

Since the Florida exemption was simply different in detail from that accorded by other States, involved no special treatment of churches, and dealt only with property necessary and primarily used for the charitable and religious functions of the church, it is difficult to see what constitutional question is involved in this case. Certainly the question that appellants seek to raise is not involved: Whether an ad valorem tax exemption can be constitu-

tionally given to a church-owned commercial enterprise, like a girdle factory, that is wholly distinct from the functions of the church except through the production of income to be used for those functions?

The real constitutional issue in this case, in appellee's judgment, is whether Florida (or any other State) can include churches in the general category of charitable nonprofit organizations and treat them, for ad valorem tax exemption purposes, the same way that it treats other nonprofit charitable organizations with respect to property that is both (1) indispensable and primarily used for exempt purposes and (2) incidentally used, to the extent compatible with the primary use for exempt purposes, for the production of income to be used for those exempt purposes.

This constitutional question is conclusively answered "Yes" by the history of our country and the decisions of this Court interpreting the No Establishment Clause.

IV. *The No Establishment Clause*

(a) *The Walz Decision.*

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court decided that churches could be given, consistently with the No Establishment Clause, the same tax relief with respect to their houses of worship that other charitable nonprofit organizations are given with respect to their basic facilities. Chief Justice Burger, speaking for an almost unanimous Court, stated:

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. . . .

. . . Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. . . . We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions. (397 U.S. at 672-73)

The *Walz* decision was an authoritative construction of the No Establishment Clause, as well as of the "no aid" doctrine in *Everson v. Board of Education*, 330 U.S. 1 (1947), and the "purpose and effect" test in *Abington School District v. Schempp*, 374 U.S. 203 (1963). There is nothing in the recent *Tilton* and *Lemon-DiCenso* decisions, 403 U.S. 602, 672 (1971), that subtracts from the authority of *Walz* with respect to tax exemptions. Indeed, *Lemon-DiCenso* confirms and emphasizes the basic distinction that this Court drew in *Walz* between tax relief for churches and grants of public funds for their religious operations.

Appellants contend that the Florida exemption at issue in this case constitutes a donation by the State to the Church. The ruling in *Walz* is otherwise. Tax exemption does not mean a donation which would constitute a subsidy involving direct transfer of public monies to the subsidized enterprise and which would use resources exacted from taxpayers as a whole. As Chief Justice Burger explained for the Court:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a page of history is worth a volume of logic." (397 U.S. at 675-76)

Mr. Justice Brennan, concurring specially, agreed that there is a basic constitutional difference between exemptions and grants:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. (397 U.S. at 690)

Despite these clear pronouncements in the *Walz* decision, appellants attempt to distinguish the instant case on three grounds:

(1) *Walz* was limited to houses of worship and does not embrace other types of church property;

(2) Unlike the exemption sustained in *Walz*, the Florida exemption here in question is not part of an ancient and universal pattern in American law; and

(3) Unlike the situation in *Walz*, denial of the exemption here in question would not engender excessive entanglement of the government with church affairs.

None of these distinctions, however, is valid. *Walz* focused on property used *only* as a house of worship because, in the plaintiff's mind, this was the most objectionable subject of a tax exemption. If, however, the sanctuary can be exempted, there can be little doubt that other types of property necessary for church functions can also be exempted. If the Central Baptist Church parking lot were not rented at all, it would clearly be directly covered by *Walz* as an essential part of the house of worship.

The fact that part of the parking lot is rented part of the time does not take the area out of the *Walz* rationale. There is nothing in Chief Justice Burger's opinion for the Court that suggests that churches must be supported only by voluntary contributions. Indeed, he explicitly adverts with approval to the long-standing exemption of churches from the federal income tax:

> For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. (397 U.S. at 676)

This statement would make no sense if the Court understood *Walz* as applying only to houses of worship supported only by voluntary contributions. Such contributions are gifts and clearly excluded from "gross income" by § 102 of the Internal Revenue Code of 1954, as amended. The exemption from the federal income tax would mean nothing if it applied only to gifts.

Moreover, Chief Justice Burger cited *Gibbons v. District of Columbia*, 116 U.S. 404 (1886), *not* for the proposition that churches cannot constitutionally be given exemptions with respect to any income-producing property (a proposition that simply is not in the *Gibbons* case), but rather for the broad discretion that this Court has always recognized in the State legislatures and in Congress with respect to the taxation and exemption of property. 397 U.S. at 679-80.

In any event, the parking area involved in this case is quite different from the church property that this Court held not exempt (under the terms of the D.C. statute then in existence) in *Gibbons v. District of Columbia*. That property was separated from the church by a street, or alley, and was not purchased for, intended to be used for, or necessary for religious purposes. The property was to be rented or sold to make a profit.

The Central Baptist Church parking lot, however, is contiguous with the Church and is a necessary part of the Church and its over-all operations. The Church could not exist without the parking lot. The property was purchased for no other purpose than to meet the great need for parking spaces for Church functions. The area was *designed* for that purpose and no other from the very beginning. POAU, in its *amicus curiae* brief, maintains: "It is what they are *designed* and used for that counts" (p. 6). There was certainly no thought on the part of the Church, in purchasing any of these lots, of going into the off-street parking business.

The property was purchased and *designed* solely to provide the necessary off-street parking for the Church

and nothing else. But, as time passed and it became apparent that some of these parking spaces were not being used during the business hours six days a week, and in view of the very great need for such off-street parking for employees in the center of this great metropolitan area, the Church decided to rent the spaces it did not need during weekday business hours. The Church devoted all of the money obtained thereby to religious, educational and missionary work of the Church.

The appellants put much credence in the word "exclusively" but that word does not appear in the old Florida statute here under consideration. The New York statutes simply used the term "solely for religious worship". This, however, shows only the appellants' ignorance of what the word "exclusively" has been held to mean in such a statute. As we have already shown in Point III of this Argument (The Structure of American Tax Exemptions), every jurisdiction permits *some* income-producing use of the home facility of charitable nonprofit organizations, including churches. *Cf.* Van Alstyne, *art. cit. supra*, pp. 499-503. Florida has simply followed a different rule with respect to rental income than that adopted by most States. With the repeal of the the 75% rule, Florida is now following a policy of partial taxation and partial exemption.

(b) *Entanglement: Avoidance.*

Finally, the *Walz* case did not hold, and no other case has ever held, that the only tax exemptions in which churches may participate are those whose denial would result in an excessive entanglement of the government with

religious affairs. To the contrary, Chief Justice Burger stated for the Court that churches cannot participate in exemptions that *do* result in excessive entanglement, not that they cannot participate in exemptions that *do not* result in excessive entanglement. 397 U.S. at 674.

In her Brief on the Merits, appellant Florence Diffenderfer contends that the aid to religion that results from the Florida exemption cannot be constitutionally justified without some "paramount countervailing factor" (p. 13) or some "weighty countervailing secular interest" (pp. 17-18). There is no such doctrine in the *Walz* case or any other decision of this Court. Even if there were, the countervailing factor or interest is easy to see: the preservation of governmental neutrality toward religion, the supreme value of the No Establishment Clause.

The fundamental holding in the *Walz* case is that churches may be included in the general category of nonprofit charitable organizations and therefore may be given the same types of tax relief available to those organizations. It seems somewhat disingenuous for the appellants to assert that *Walz* speaks "only" of houses of worship, when the organization to which they belong portrayed the house of worship exemption during the *Walz* litigation as a supreme example of governmental aid to religion. One can only suppose that, should the appellants lose this case, they will say that *Diffenderfer* stands only for the exemptibility of church parking lots, not of other facilities equally indispensable for church functions.

The three-judge district court below held that, since *Walz* approved the constitutionality of exempting houses of worship in common with the basic facilities of other exempt organizations, the decision *a fortiori* approved the exemption of church parking-lots used primarily for church

functions and incidentally rented to the public (Appendix to the Jurisdictional Statement, pp. 6, 8). The District Court seemed to be saying that if government can exempt what is most sacred, it can exempt what is less sacred. After all, it is a legal commonplace that the legislature *can* exempt strictly commercial facilities of profit-making businesses. Indeed, the recent revision of the Florida Tax Exemption Laws has affected commercial and residential property far more than it has affected church property. See Montgomery, "Expanding the Rolls," Wall Street Journal, October 14, 1971, Page 1, column 6.

It is neither necessary nor appropriate, however, to read this interpretation of the District Court as a constitutional blanket for the exemption of totally unrelated business enterprises owned by churches. All that the District Court was saying is that, since a State is free to exempt a house of worship in the same way that it exempts a hospital or a university, it is also free to exempt a church parking area in the same way that it exempts a hospital or a university parking area.

What the appellants are really trying to do in this case is to resuscitate the "no aid" language of the *Everson* case, the absolutism of which was carefully qualified by this Court in *Walz*, *Tilton* and *Lemon-DiCenso*. The appellants have invited the Court to hold that the aid to religion that results from the inclusion of churches in general tax exemptions for charitable nonprofit organizations is fatal to the constitutionality of such inclusion unless (1) exclusion would result in excessive entanglement of government with religious affairs or (2) there is some other "paramount countervailing secular interest" that justifies the inclusion of churches.

The doctrine proposed by appellants is a far cry from the principles enunciated by this Court in *Walz* and recently reaffirmed in *Lemon-DiCenso*. The appellants' version of the "no aid" doctrine creates a presumption of unconstitutionality from the mere fact that a statute results in aid to religion. This converts the "no aid" doctrine into a policy of anticlericalism, of hostility to organized religion. More importantly, appellants fail to recognize that the "no aid" doctrine is only one side of the constitutional coin — the other is "no hurt." If exemption helps, taxation hurts. The appellants are caught in the dilemma of their own dialectics. See the *Sunday Closing Law Cases*, 366 U.S. 420 (1961), and the *Selective Conscientious Objector Cases*, 401 U.S. 437 (1971).

The central value of the *Walz* case is governmental neutrality towards religion, the same neutrality that Mr. Justice Clark emphasized so clearly for the Court in *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). As Chief Justice Burger stated for the Court in the *Walz* case:

> The general principle deducible from the First Amendment and all that has been said by this Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (397 U.S. at 669)

Later in the same opinion, the Chief Justice further explained this point:

> Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against these dangers. The limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself (397 U.S. at 673)

The obvious purpose of these passages was to explain the *Everson* doctrine that government cannot "aid" religion. Positive aid, by way of government expenditures necessitating regular appropriations, is one thing. Passive aid, or aid by abstention, by way of including churches in general exemptions for charitable nonprofit organizations, is quite another. The government has room for "play in the joints"; it is not forced to every exemption or to every tax.

If there was any doubt about this interpretation of *Walz*, it was removed by *Lemon-DiCenso*, where the distinction between exemptions and grants was made of governing constitutional significance. *Lemon-DiCenso* invalidated two programs of public *payments* to church-related schools and their teachers for teachers' salaries. It did not invalidate, or cast any cloud on, the traditional tax exemptions given those schools, their parking lots and other facilities.

The distinction between grants and exemptions may seem a constitutional anomaly to some. In fact, it is a typical American pragmatic compromise, based on solid practical considerations and validated by almost two centuries of experience. The governmental decision to abstain from taxation is, as Professor Freund has noted, a significant symbol that "organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, "Public Aid to Parochial Schools," 82 *Harvard Law Review* 1680, 1687 n. 16 (1969). Confronted by the "dilemma" that taxation will hurt religion, and exemption will help it, government is free to choose the course of exempting churches in common with other charitable nonprofit organizations. Churches, after all, perform many of the same functions as charitable nonprofit organizations, and should not have to restructure themselves legally in order to benefit from exemptions provided for the common good. Even in the case of the church that performs *no* secular welfare function, the government is justified, as the *Walz* case explicitly held, in abstaining from taxation as a sign and proof of the fiscal separation of church and state.

Accordingly, appellant Florence Diffenderfer's contention that *Walz* maintains the "no aid" doctrine in the tax exemption field except where taxation would result in excessive entanglement must be rejected. *Walz* rests simply on the proposition that, for the secular purpose and effect of governmental neutrality towards religion, churches may be given the same exemptions as other charitable nonprofit organizations. The fact that, as in *Walz*, the denial of an exemption *solely* to property used *only* as a house of worship would have resulted in an excessive entanglement

of the government with religious affairs is simply one aspect, not an indispensable element, of governmental neutrality.

The true thrust of the "excessive entanglement" doctrine is that churches cannot be given tax relief that results in excessive entanglement. They can be given tax relief that does *not* result in excessive entanglement, as was the case in *Walz* and is the case in the present litigation. The Florida exemption at issue in this case, far from resulting in any excessive entanglement of the State in religious affairs, actually tended to minimize the involvement of the government with church matters. It is irrelevant, therefore, that a policy of taxation rather than exemption would also not have resulted in excessive entanglement.

(c) *Entanglement: Surveillance.*

It should not be assumed too easily, however, that a policy of taxation of church parking lots such as the one involved in this case would be just as free of the dangers of excessive entanglement as a policy of exemption. Much will depend upon the way in which the statute is written. Consider, for example, the consequences of a rule that *any* or *some* "nonreligious use" of property belonging to churches means constitutional cancellation of the exemption. Such a rule would mean that the government would have to engage in continuing surveillance of all uses of church property and constantly make decisions about what is religious and what is not. Instead of the present relatively simple system, under which the government uses obvious external tests to determine whether an organization is functioning as a church or not (without minute

internal inquiry into every activity that the church is carrying on), we would have a system of constant inspection and auditing. That is forbidden by the No Establishment and Free Exercise Clauses. *Lemon-DiCenso*, 403 U.S. 602 (1971).

Certainly, in the interest of avoiding excessive entanglement with religious affairs, a government is free to abstain from any further inquiries than whether the organization is basically a church or not and whether the property in question is necessary for the achievement of its religious purposes.

This is not to say that the government *cannot* also make the opposite choice, not by way of scrutinizing church affairs closely, but by establishing certain simple rules of commercial use that result in loss of the exemption. For example, the common practice of the States supports their right to legislate that any public rental of property belonging to an exempt organization results in total or proportional loss of the exemption with respect to such property. Under such a rule, the State would not have to inquire into religious affairs, but simply into whether the property was publicly rented.

Until its recent repeal, however, of the policy, Florida chose to go the equally simple but different route of permitting exempt organizations, including churches, to keep the exemption with respect to property that was necessary and primarily used for exempt purposes, even though a part of the property was rented to the public part of the time. The secular purposes and effects of such a policy are clear: to simplify the administration of the tax laws; to encourage the productive use of property for which

there is a public demand and which might remain idle if the exemption was forfeited by partial rental; and, so far as the inclusion of churches in the policy is concerned, to guarantee governmental neutrality toward religion.

To the extent that Florida's policy was beneficial to the exempt organizations themselves, by allowing them to retain this type of rental income tax-free for the accomplishment of their exempt purposes, the policy was perfectly consistent with the Constitution. This is obviously true of exempt organizations carrying on activities that could be performed by government itself. With respect to the charitable and religious functions of churches, the policy is still unobjectionable. Benefits accruing to churches from neutral and secularly valid governmental policies do not render those policies unconstitutional. The "no aid, no hurt" doctrine of *Everson* was never meant to give the churches, or anyone else, a general veto power over otherwise secularly valid policies of the government. See the *Sunday Closing Law Cases*, 366 U.S. 420 (1961); *Selective Conscientious Objector Cases*, 401 U.S. 437 (1971).

Moreover, any aid that resulted to churches from this Florida policy was *exemption* aid, not *grant* aid. No dollar was exacted from any Florida taxpayer and put in the treasury of the Central Baptist Church. As the *Walz* case unmistakably holds, there is a vast constitutional difference, grounded in history and considerations of public policy, between an exemption and a grant of public funds. Accordingly, since the Florida exemption here in question had the requisite secular purpose and effect, and did not result in an excessive entanglement of the government with religious matters, the exemption did not violate the No Establishment Clause of the Constitution.

(d) *Entanglement: Politics.*

Towards the end of her Brief on the Merits, appellant Florence Diffenderfer states (p. 20): "There can be little doubt that these tensions and the politicization of religion are inevitable concomitants of tax exemption for church-owned commercial enterprises." Appellant, unfortunately, has totally misconceived the facts of this case, the history of the country, and the doctrine of the *Waltz* and *Lemon-DiCenso* decisions.

As appellee has repeatedly pointed out, this case does not involve the issues inherent in an "exemption for church-owned commercial enterprises" like the exemption formerly given under § 511 of the Internal Revenue Code of 1954. All that this case involves is the exemption of all charitable nonprofit organizations with respect to property that is both (a) indispensable and primarily used for exempt purposes and (b) used incidentally for income-producing purposes during the time that it is not needed for exempt purposes.

So far as the political history of tax exemptions is concerned, the words of Chief Justice Burger in his opinion for the Court in *Walz* are most apposite:

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercises generally so long as none was favored over others and none suffered interference. (397 U.S. at 676-77)

If the inclusion of churches in the tax exemptions given generally to all charitable nonprofit organizations "politicizes" religion, then religion has been politicized in the United States for 200 years. As Chief Justice Burger noted for the Court in *Lemon-DiCenso*, tax exemptions given in common to all churches do not create the kind of political divisiveness that the First Amendment was intended to prevent (39 U.S. Law Week at 4850).

(e) *History: The Incidental Use Doctrine.*

Appellants vigorously urge, however, that despite the perfect fit of the Florida exemption with the *Walz* rationale, the lack of any historical pedigree for this type of exemption is fatal to its constitutionality. The other States do not do it, appellants say; therefore Florida cannot do it. Startling as this proposition is as a rule of constitutional law, the proposition is even more startling, as we have already pointed out in Point III of this Argument, in its total misunderstanding of the structure of American tax exemptions.

Every American jurisdiction has commonly and continuously allowed charitable nonprofit organizations, including churches, *some* use of their basic, necessary facilities for the production of income without loss of the exemption from ad valorem taxes. Lines, indeed, have been drawn between unrelated property and unrelated businesses on the one hand, and incidental use and traditional fund-raising activities on the other.

If a charitable nonprofit organization, whether a church or not, owns property that is physically separate from its home facility and that is used for non-exempt purposes, the exempt organization must pay the ad valorem tax on the property in every State and Territory of the

Union. If the property is part of the home facility and is necessary and actually used for exempt purposes, different States have drawn different lines in determining how much *incidental nonrelated* use of the property can be made without loss of the exemption. But in every State and in the District of Columbia, churches are permitted, in common with other charitable nonprofit organizations, to make *some* use of their necessary home facilities for various fund-raising activities that are more or less commercial in character.

Perhaps the most common examples of this, in the case of churches and synagogues are pew rents, seat payments and social affairs such as picnics, dinners, bazaars and dances. The pew rents and seat payments, indeed, are limited to members of the congregation, but the other types of activities are not. The point is that *some* income-producing use of the home facility has been allowed since time immemorial in every jurisdiction without loss of the tax exemption.

(f) *History: The "Destination Principle."*

Appellee does not believe that this is an appropriate case for testing the constitutionality of the "destination principle" in tax exemptions of charitable nonprofit organizations. That principle properly belongs in the field of *income* tax exemptions, where it finds its widest and most substantial application. See, 12 Mertens, *Law of Federal Income Taxation* §34.14. Any attempt to explore the history of this principle in the present case would take the parties and the Court far afield from the Florida exemption here in issue.

We note again, however, that Chief Justice Burger, in his opinion for the Court in the *Walz* case, mentioned

the federal income tax exemption for churches as equally acceptable with the New York ad valorem tax exemption. 397 U.S. at 676. This is fully consistent with the Court's rationale that tax exemptions do not transfer public dollars into the hands of charitable nonprofit organizations, whether churches or not.

The Florida requirement that income realized from partial rental of home facilities had to be devoted to exempt purposes created no potential for "excessive entanglement." As long as the Central Baptist Church used the income for any of its exempt purposes (charitable, benevolent, fraternal, educational or religious), the Church satisfied the statutory requirement. If the statute had required that the income be devoted to "exclusively religious" purposes, in the sense that any generally charitable use of the income would not have been sufficient, there might have been a problem of potentially excessive entanglement. The statute, however, did not do so.

Moreover, in the instant case, there was no searching scrutiny by the lower court of the activities of the Central Baptist Church. The parties stipulated that the rental income was used in accordance with the requirements of the statute. To strike the statute down on the basis of the restriction on the use of the rental income would be to substitute doubtful fears for proven facts.

Finally, regardless of the "destination principle," government must be able to exercise *some* supervision over the uses to which charitable nonprofit organizations, including churches, put their funds. There is not a shadow of evidence in the present case that the supervision by Florida has been excessive or inquisitorial.

V. The Free Exercise Clause

It is well settled that, absent the showing of a coercive effect on the appellant's exercise of his own religion, no case under the Free Exercise Clause has been established. *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961); *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968). Appellants have not shown or alleged any coercive effect of the Florida exemption on the practice of their own religion. In the *Walz* case, the plaintiff's Free Exercise claim was not even discussed by Chief Justice Burger in his opinion for the Court. Accordingly, the appellants' Free Exercise contention in the present case is frivolous. It is the No Establishment Clause, not the Free Exercise Clause, that protects citizens against governmental expenditures for religion. *Flast v. Cohen*, 392 U.S. 83, 103 (1968). There was no expenditure of public funds in the present case.

VI. The Equal Protection Clause

Appellants fare no better with their Equal Protection claim. First of all, appellants obviously lack standing to raise the Equal Protection issue. They are not commercial parking lot operators, and the equal protection of taxpayers is not violated, as innumerable decisions have held, by the granting of exemptions to nonprofit charitable organizations. The legislature does not have to tax everybody and everything. When it does impose taxes, it does not have to impose them on every taxpayer at the same flat rate. *Bell's Gap R. Co. v. Pa.*, 134 U.S. 232, 237 (1890). Only flagrantly invidious classifications in the tax laws offend the Equal Protection Clause.

If there is an equal protection issue in this case, it is on appellee's side rather than appellants'. If a State legislature systematically excluded churches from the tax relief given generally to other charitable nonprofit organizations, there would certainly be a Free Exercise issue and possibly an Equal Protection issue.

Except for *WHYY v. Borough of Glassboro*, 393 U.S. 117 (1968), appellee has not been able to find a case in the last 25 years in which this Court invalidated a State tax law on the basis of the Equal Protection Clause. Interestingly enough, the point of the *WHYY* case was that New Jersey could not *exclude* a foreign nonprofit corporation that had qualified to do business in the State from the benefits of its general ad valorem exemption for charitable nonprofit corporations.

In most of the earlier cases in which an equal protection attack was made on State tax laws or tax exemptions, the attack was unsuccessful. See, for example, the decisions cited in *The Constitution of the United States of America: Analysis and Interpretation* 1285-92 (U.S. Govt. Printing Office, 1964). The consistent doctrine of this Court has been that the Equal Protection Clause has no application to tax law except for flagrant abuses based on race, sex, or national origin, or for gross discrimination against a particular business or against foreign corporations that have been admitted to do business in a State. None of these abuses or discriminations is involved in the present case.

There can scarcely be a more reasonable basis for difference in tax treatment than the distinction between charitable nonprofit organizations and commercial organizations operated for profit. Florida has treated all nonprofit charitable organizations, including churches, alike. There is no Equal Protection issue.

CONCLUSION

Appellants' claims are based on a misunderstanding of the facts and of the law. They also seem to be based on hostility towards what the appellants regard as the "wealth of the churches." The POAU *amicus* brief alleges that many churches of late have branched out into the business world and own real property for income purposes (p. 14). That may be true. We are not dealing, however, with "many churches," but only with the Central Baptist Church of Miami. Such general and unsubstantiated allegations are characteristic of the entire POAU brief. It was predicated upon supposed facts wholly different from those actually involved in this case.

Many court opinions — 28 in all — are cited in appellants' briefs, but not one holding that a tax exemption of church-owned property constitutes an establishment of religion or prohibits the free exercise thereof. The reason is obvious. *Walz v. Tax Commission* settled that question. Although every State has a tax exemption statute, no court, federal or state, has ever declared a tax exemption for churches unconstitutional. In their desperation, appellants even dig up the ancient mortmain statutes, which, of course, have not the slightest bearing on this case.

Apparently, appellants are attempting, with all these citations and quotes, to assist this Court in maintaining its balance while traversing the "tight rope" mentioned by Chief Justice Burger in his opinion for the Court in *Walz*. 397 U.S. at 672. The facts and the law, however, are both so clear in this case that we submit that the Court will not have to walk a tight rope in finding that the exemption here involved does not constitute an establishment, nor prohibit the free exercise, of religion. The Court can proceed down the broad highway of facts and law without fear of losing its balance.

Since appellants have failed to sustain their contention that the Florida exemption here in question violates the No Establishment, Free Exercise, or Equal Protection Clause of the Constitution, appellee Central Baptist Church of Miami respectfully prays this Court to affirm the judgment of the court below. If, however, this Court agrees with appellee that this case has become moot as a result of action by the Florida legislature, in repealing the statute under attack, appellee requests this Court to dismiss this appeal as moot.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief and Appendix of Appellee, Central Baptist Church of Miami were served by mail this 19th day of October, 1971 to: HOWARD J. HOLLANDER, ESQ., BERNARD C. PESTCOE, ESQ., RICHARD FEDER, ESQ., and LEO PFEFFER, ESQ., Attorneys for Appellants, c/o American Civil Liberties Union, 708 City National Bank Building, Miami, Florida 33130; and STUART SIMON, ESQ., Attention ST. JULIEN P. ROSEMOND, ESQ., Dade County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, by depositing the same in a United States post office, or mail box, with first-class postage prepaid addressed to counsel of record at his post office address.

Of Counsel

APPELLEE'S APPENDIX A

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY

No. 66C11592 — Herin

CENTRAL BAPTIST CHURCH OF MIAMI, FLORIDA, INCORPORATED,
a non-profit Florida corporation,

Plaintiff,

vs.

DADE COUNTY, FLORIDA, a political subdivision of the State of Florida; PORTER W. HOMER, as County Manager of Metropolitan Dade County; R. K. OVERSTREET, as Tax Collector of Metropolitan Dade County; and FRED O. DICKINSON, JR. as Comptroller of the State of Florida,

Defendants.

AFFIDAVIT of MILLER WALTON, Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated, in support of plaintiff's motion for summary final decree.

State of Florida)
) SS.
County of Dade)

Personally appeared before me a Notary Public in and for the State of Florida at Large, MILLER WALTON, who, being duly sworn, says:

I am, and have been continuously at all times since February 11, 1953, Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated (referred to hereinafter as the "Church"), and was a member of the Committee during by far the greater part of the time from September 24, 1947, until I became Chairman. I also am, and have been continuously at all times since September 24, 1947, a Deacon in the Church. From the performance of my duties in those capacities, as well as from having been a member of the Church continuously at all times since May 1, 1938, I know the matters and things alleged in the complaint, as amended, and those set out hereinafter in this affidavit.

I have read the complaint, as amended. All of the matters and things alleged therein are true, with two exceptions. The first is that in the real property descriptions the terms "NORTH DADE" and "NORTH MIAMI" were intended to be and should have been "MIAMI NORTH."

The second exception is that in paragraph XIII the allegation that when the Church was incorporated it owned Lots 18, 19 and 20 and the south 100′ of Lots 1 and 2, is erroneous. As set out more fully hereinafter in this affidavit, the facts are that when the Church was incorporated it did not own any of those properties, and after its incorporation the Church first became the owner of Lots 18, 19 and 20, and later became the owner of the south 100′ of Lots 1 and 2.

The Church was incorporated on June 29, 1936, as a non-profit corporation. A true copy of the Corporate Charter of the Church and a true copy of the only amendments thereto are attached to this affidavit and by reference made a part hereof as composite Exhibit 1.

The purposes and objects of the Church are set forth in Article II of the Charter as follows:

> "The general purposes and objects of this corporation shall be to conduct for religious worship and instruction churches, schools, parsonages, and other institutions connected therewith of a religious, educational, charitable and benevolent character to the end that its own members and others may be generally instructed and guided concerning those articles of faith which are most surely held among Southern Missionary Baptist Churches and to advance spiritual growth and enlightment, moral and personal purity among its own membership and the people of the community in which it is located; to promote home and foreign misions; and to aid in the spread of the Gospel of Jesus Christ to the ends of the earth; also to educate, prepare, and ordain Christian men and women for the ministry of the Gospel of Jesus Christ; and for the purpose of promoting the foregoing objects, this corporation shall have the right to acquire, either by gift or purchase, and to hold, own, sell, mortgage, or encumber in any manner, lease and improve real estate and personal property for itself and others, either as trustee or otherwise."

The Church was re-incorporated as a non-profit corporation under Chapter 617, Florida Statutes, on March 3, 1967, by an Amended Certificate of Incorporation, a true copy of which is attached to this affidavit and by reference made a part hereof as Exhibit 2.

The purposes and objects of the Church are set forth in Article II of the Amended Certificate of Incorporation as follows:

> "The general purposes and objects of this corporation shall be to conduct for religious worship and instruction, churches, schools, parsonages, and other institutions connected therewith of a religious, educational, charitable and benevolent character to the end that its own members and others may be generally instructed and guided concerning those New Testament doctrines which are most surely held among Southern Missionary Baptist Churches and to advance spiritual growth and enlightment, moral and personal purity among its own membership and the people of the community in which it is located; to promote home and foreign missions; and to aid in the spread of the Gospel of Jesus Christ to the ends of the earth; also to educate, prepare and ordain Christian men and women for the ministry of the Gospel of Jesus Christ; and for the purpose of promoting the foregoing objects, this corporation shall have the right to acquire, either by gift or purchase, and to hold, own, sell, mortgage, or encumber in any manner, lease and improve real estate and personal property for itself and others, either as trustees or otherwise."

Each and every and all of the exhibits attached to the complaint, being Exhibits A, B, C, D and E, is a true and correct copy of the original thereof, and each of said exhibits is by reference made a part of this affidavit.

In addition, there is attached hereto as Exhibit 3, and made a part hereof by reference, a true and correct copy of the Church's monthly operating report for December 1966. As shown by this exhibit in the tabulation at the bottom of the last page, Budget Receipts of the Church in the year 1966 amounted to $293,102.22, and as shown in the third page of the exhibit, this amount of Budget Receipts, together with a balance of $975.04 on hand on January 1, 1966, or a total amount of $294,077.26, was disbursed by the Church in 1966 in strict compliance with the provisions of its 1966 Budget attached to the complaint as Exhibit "C".

The Church's Sanctuary, together with its Sunday School Education Building, a downtown "come-as-you-are" Mission which the Church maintains for less fortunate and destitute persons sojourning in or nearby the immediate area, and the Church's off-street parking areas described in the complaint, as amended, are located in the downtown business section of the City of Miami, in the city block bounded on the north by N.E. Sixth Street, on the east by N.E. First Avenue, on the south by N.E. Fifth Street, and on the west by North Miami Avenue. This block was platted as Block 63 MIAMI NORTH, by plat dated June 9, 1896, filed in the Dade County Public Records on August 8, 1896, by Mary Brickell, Wm. B. Brickell, Julia D. Tuttle and Fort Dallas Land Company.

This city block is, and has been increasingly for many years, surrounded by business establishments and commercial enterprises which extend over large areas in all directions, and there are not and have not been in recent years any substantial residential areas in the

vicinity. The Church is not a local, community oriented Church (in the sense of one having a surrounding residential area or relatively nearby residential areas). Due to its location in the downtown business section of a large city, the Church unavoidably has evolved over the years into a metropolitan downtown Church attended by members and others who must travel substantial distances to attend services and other functions of and meetings at the Church.

Affiant's home is located approximately five miles southwest of the Church. Very few, if any, members or others who attend services and other functions of and meetings at the Church, reside appreciably closer to it. The vast majority reside from five to fifteen miles north, east, south or west of the Church. Public transportation is utterly inadequate as a means for them to travel to or from the Church. They can travel to or from it only in private automobiles. When they are at the Church they must have some place to park their automobiles, otherwise they cannot attend.

The few and constantly decreasing on-street parking spaces on the surrounding paved streets, on some of which streets parking is prohibited at all times, are grossly insufficient in number for parking even a small fraction of the number of automobiles for which parking area must be available during services and other functions of and meetings at the Church. The inescapable fact is that if the Church had not provided its present off-street parking area it would have withered and died, as many downtown Churches lacking sufficient parking area have done in other cities.

The Church's off-street parking area was acquired and is used and provided by the Church as an off-street area in which members and others attending, among others, the following services and functions of and meetings at the Church, may park, without charge of any kind, the automobiles in which they have traveled to the Church:

(i) Members and others attending Sunday School on Sundays.

(ii) Members and others attending the Morning Worship Service on Sundays.

(iii) Members and others using the Church Library on Sundays.

(iv) Members and others attending practice of the Bell Choir in the afternoon of many Sundays.

(v) Members and others attending practice of the Concord Choir in the afternoon of many Sundays.

(vi) Members and others attending practice of the Chapel Choir in the afternoon of many Sundays.

(vii) Members and others attending the Training Union Fellowship in the late afternoon of Sundays.

(viii) Members and others attending the Training Union in the early evening of Sundays.

(ix) Members and others attending the Evening Worship Service on Sundays.

(x) Members of the Executive Board of the Miami Baptist Association, which has more than 200 members, attending on at least 12 Mondays in every year meetings which begin in the morning and continue through lunch and into the afternoon.

(xi) Members and others attending in the late afternoon of at least 12 Mondays in every year meetings of the Church's Men's Brotherhood.

(xii) Deacons in the Church meeting in the evening of at least 12 Mondays in every year.

(xiii) Members and others attending practices of the Children's Choirs in the afternoon of many Wednesdays in the year.

(xiv) Members and others using the Church library in the afternoon of every Wednesday in the year.

(xv) Members and others attending practice of the Bell Choir in the afternoon of many Wednesdays in the year.

(xvi) Members and others attending the Family Supper in the late afternoon of every Wednesday in the year.

(xvii) Members and others attending Officers and Teachers meetings, Departmental meetings and numerous other meetings in the early evening of every Wednesday in the year.

(xviii) Members of and the clerical assistant to the Finance Committee of the Church in attendance at meetings in the evening of every Wednesday in the year.

(xix) Members and others attending Prayer Meeting in the evening of every Wednesday in the year.

(xx) Members and others attending practice of the Sanctuary Choir, having over 100 members, in the evening of substantially every Thursday in the year.

(xxi) Members and others attending meetings of the Women's Missionary Society in the morning of at least 12 Fridays in the year.

(xxii) Those in attendance on week days at monthly day time meetings of the Ministers' Conference of the Miami Baptist Association.

(xxiii) Those in attendance on week days at monthly day time meetings of the Miami Council of Churches.

(xxiv) Those in attendance on week days at monthly day time meetings of members of the Parents Teachers Association.

(xxv) Those in attendance at any wedding held at the Church.

(xxvi) Those in attendance at any funderal service conducted at the Church.

(xxvii) Numerous other morning, afternoon and evening week day Church, denominational, religious, educational, literary, benevolent, fraternal and charitable gatherings, meetings, activities and programs.

The Church never has made, and does not make, any charge of any kind for any of its off-street parking spaces used at any time for any purpose stated in any of the foregoing paragraphs numbered (i) to (xxvii), inclusive, and has made, and now makes, charges only on week days (Monday through Saturday) for such of its off-street parking spaces as are not in use for any of those purposes.

When the Church was incorporated on June 29, 1936, it did not own any of the real property described in the complaint, as amended, but was occupying and using, and thereafter continued to occupy and use, the Church Sanctuary, which was then and still is situate on Lots 18, 19 and 20, shown on Exhibit A to the complaint.

The Church thereafter purchased and became the owner of Lots 18, 19 and 20 on January 4, 1937. A true

copy of the deed of conveyance to the Church is attached hereto as Exhibit 4 and made a part hereof by reference.

At, and before, and after, the date on which the Church was incorporated, the south 100' of Lots 1 and 2, shown on Exhibit A to the complaint, which south 100' is contiguous to Lots 19 and 20, was not owned by the Church but was vacant and unimproved, and was available for use and was used as off-street parking area for the automobiles of members and others attending services and functions of and meetings at the Church.

The Church purchased and became the owner of the south 100' of Lots 1 and 2, on December 22, 1943. A true copy of the deed of conveyance to the Church is attached hereto as Exhibit 5 and made a part hereof by reference.

The number of automobiles used in the period of 1936-1939, by members and others for transportation to and from services and functions of and meetings at the Church was far less than the number so used in recent years. However, even with the relatively small number of automobiles so used in those earlier years, it soon developed that the off-street parking afforded by the south 100' of Lots 1 and 2, together with the limited on-street parking in the vicinity of the Church, was inadequate to provide parking for that relatively small number of automobiles, and that, for the Church to survive, it imperatively was necessary for the Church to provide additional off-street parking area for automobiles so used.

In recognition of this imperative need, and to assure survival of the Church, members of the Congregation purchased, and on January 16, 1940, donated to the

Church, Lots 6 and 7 for use by the Church as off-street parking area for automobiles of members and others attending services and functions of and meetings of the Church, and Lots 6 and 7 have been at all times since, and are now, used by the Church for that purpose. A true copy of the deed conveying Lots 6 and 7 to the Church is attached hereto as Exhibit 6 and made a part hereof by reference.

During World War II, few, if any, automobiles were manufactured except for military uses. Automobiles could not be purchased by individuals and families for private use, and gasoline was rationed. Due to those conditions the need of the Church to provide additional off-street parking area for the automobiles of members and others attending services and functions of and meetings at the Church did not increase appreciably until the years following the end of World War II, when gasoline rationing was terminated and automobiles again were manufactured for sale and were sold to the public.

On April 15, 1948, the Church purchased and became the owner of Lot 3. A true copy of the deed conveying Lot 3 to the Church is attached hereto as Exhibit 7 and made a part hereof by reference.

The Church thereafter constructed its Sunday School Educational Building on the south 100' of Lots 1, 2 and 3, with the result that the south 100' of Lots 1 and 2, which theretofore had been available for use and had been used for off-street parking of the automobiles of members and others attending services and functions of and meetings at the Church, no longer was available for and could not be used for that purpose.

In the period of 1947-1950 the number of automobiles used by individuals and families to attend services and functions of and meetings at the Church continually increased materially. The exact extent of the increase is not known. Affiant estimates that by the early part of 1950, the number of automobiles so used was at least five times greater than the number so used in the period of 1936-1939. In early 1950, however, Lots 6 and 7 comprised the only off-street parking area owned by the Church for parking automobiles so used, and that off-street parking area, together with the limited and ever decreasing on-street parking area in the vicinity of the Church, had become and was grossly inadequate for parking automobiles of members and others attending services and functions of and meetings at the Church, and it had become and imperatively was necessary, if the Church was to survive, for the Church to enlarge its off-street parking area to the greatest extent possible and as rapidly as possible.

By reason of this imperative necessity, and to assure the survival of the Church, and solely for the purpose of providing for off-street parking of automobiles of members and others attending services and functions of and meetings of the Church, the Church's off-street parking area, consisting at that time of only Lots 6 and 7, thereafter was enlarged as follows:

On December 8, 1950, the Church acquired and added Lot 14 to its off-street parking area.

On November 7, 1951, the Church acquired and added Lot 17 to its off-street parking area.

On April 11, 1952, the Church acquired Lot 16 and demolished a residential building thereon and added the lot to its off-street parking area.

On April 14, 1952, the Church acquired and added to its off-street parking area the north 105' of Lot 15.

On January 29, 1954, the Church acquired and added to its off-street parking area the south 75' of Lot 13.

On December 9, 1954, the Church acquired and added to its off-street parking area the south 45' of Lot 15.

On December 31, 1956, the Church acquired the north 50' of Lots 1 and 2 and demolished a commercial building thereon and added this property to its off-street parking area.

On October 7, 1959, the Church acquired Lots 8, 9 and 10 and the north 75' of each of Lots 11, 12 and 13 and demolished a group of commercial buildings thereon and added more properties, except the north 50' of Lots 9 and 10, to its off-street parking area.

A true copy of each of the deeds conveying to the Church the respective properties described in the immediately preceding eight paragraphs hereof is attached hereto as composite Exhibit 8 and made a part hereof by reference.

The increase since 1950 in the number of automobiles used by individuals and families in attending services and functions of and meetings at the Church has been so great that the automobiles so used cannot be accommodated in the 290 spaces in the Church's off-street parking area. To accommodate and make provision for parking the large number of automobiles in excess of 290, used by members and others on Sundays to attend services and functions of and meetings at the Church, a commercial parking lot (not owned or operated by the Church), located on Northeast 5th Street, across that street from the Church, is leased by the Church on Sundays for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

The Church also has arranged for the use on Sundays of another commercial parking lot (not owned or operated by the Church), located on Northeast 6th Street, across that street from the Church's off-street parking area, for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

In addition, the Church has arranged with a number of business establishments and commercial enterprises in the general vicinity of the Church for off-street parking lots and areas maintained by such establishments and enterprises to be used on Sundays, for parking, free of charge, automobiles for which none of the Church's 290 off-street parking spaces is available.

The auditorium of the Church has a seating capacity of approximately 2200. If the congregation should attempt, at this time, to build the Church Sanctuary on

any other property in the City of Miami, except within the C-3 (Central Commercial) District, Ordinance No. 6871 of the City would require the congregation to provide for such new Church one off-street parking space for each five seats in the auditorium, or a total of approximately 440 off-street parking spaces. The requirement in the unincorporated area of the county is one parking space for each four seats in a church auditorium, Code of Metropolitan Dade County, §33-124(d). This would mean, were the Church in an unincorporated portion of the county, it would be required to have 550 off-street parking spaces.

The area of the off-street parking spaces for which the Church makes charges on week days is less than 75% of the total area of the real property owned by the Church in the city block, and is an integral and functional and physical part thereof, and is an indispensable and essential Church property used by the Church solely and exclusively in furtherance of the religious, educational, literary, benevolent, fraternal and charitable purposes and objects of the Church set out in its original Charter and in its Amended Certificate of Incorporation.

Affiant further says that every dollar of income realized by the Church as the proceeds of charges made by the Church for the use of any of its off-street parking spaces is appropriated by the budget of the Church, and is used by the Church each month, exclusively for the Church's World Missions and Educational Program. None of this income is used for any other purpose, directly or indirectly. None of the expenses of operating the Church's off-street parking area are paid by or from any portion of any charges made by the Church for the use of any of its off-street parking spaces.

The Church's World Missions and Educational Program is exclusively a religious, educational, literary, benevolent, fraternal and charitable program. The moneys appropriated and disbursed for the program, including but not limited to the entire proceeds of all charges made by the Church for the use of any of its off-street parking spaces, are disbursed to or for the benefit of the following persons, organizations and institutions or in the furtherance of the following purposes and beneficences:

a. Cooperative Program of Southern Baptist Convention

b. Miami Baptist Association

c. American Bible Society

d. Baptist Bible Institute

e. Fay Taylor Salary (Missionary)

f. Terry and Wilma Thorpe Salaries (Missionaries)

g. Religious Broadcasting

h. Local Missions

i. Protestants and Other Americans United

j. United Christian Action

k. Miami Council of Churches

l. Stetson University

m. Ministerial Retirement

n. Spanish Mission

As shown on page 3 of Exhibit 3 hereto, such disbursements amounted in 1966 to $67,413.61. This amount included, in addition to other funds, the entire proceeds

of all charges made by the Church in 1966 for the use of any of its off-street parking spaces. The disbursements were as follows:

a.	Cooperative Program of Southern Baptist Convention	$18,632.49
b.	Miami Baptist Association	8,000.00
c.	American Bible Society	100.00
d.	Baptist Bible Institute	200.00
e.	Fay Taylor Salary (Missionary)	2,000.00
f.	Terry and Wilma Thorp Salaries (Missionaries)	2,000.00
g.	Religious Broadcasting	7,633.00
h.	Local Missions	21,300.00
i.	Protestants and Other Americans United	100.00
j.	United Christian Action	100.00
k.	Miami Council of Churches	1,200.00
l.	Stetson University	4,400.00
m.	Ministerial Retirement	1,320.12
n.	Spanish Mission	428.00
	Total	$67,413.61

Defendants intend to collect the ad valorem taxes which are the subject of this action. The collection of such taxes from the Church will proximately cause and result in immediate and irreparable harm and damage,

because the Church's budget expenditures in 1966 for religious, educational, literary, benevolent, fraternal and charitable purposes, would have been, and its budget expenditures for those purposes in 1967 will be severely curtailed and the humanitarian causes served thereby harmfully jeopardized and impaired.

As shown by the tabulation at the bottom of the last page of Exhibit 3 hereto, the Church's budget receipts in 1966, including but not limited to the entire proceeds of all charges made by the Church for the use of any of its off-street parking spaces, amounted to $293,102.22. This amount was $34,973.58 less than the $328,076 total of the Church's 1966 budget.

As a result of this budget deficit, the Church was unable to and did not pay in full its 1966 World Missions and Educational Program budget appropriation in the amount of $25,575 for the Cooperative Program of the Southern Baptist Convention, and was able to and did pay only $18,632.49 of that budget appropriation, and, as set forth by the tabulation at the top of the first page of Exhibit 3 hereto, the Church also was unable to and did not pay other 1966 budget appropriations totaling $11,841.01.

If the ad valorem taxes which are the subject of this suit had been collected, the amount thereof could not have been used to defray budget appropriations, and such deficits in the payment of budget appropriations would have been increased by that amount.

Moreover, by operation of law, this tax claim, if not paid, will constitute a cloud on and wrongfully impair

the Church's title to its off-street parking area. All of the foregoing immediate and irreparable damage and harm to the Church is without adequate remedy at law, because it cannot be remedied or compensated by a money judgment.

s/ Miller Walton

Miller Walton

Before me this day personally appeared MILLER WALTON to me well known and known to me to be the person described in and who executed the foregoing instrument, who is to me well known and being sworn deposes and says that he is the Chairman of the Finance Committee of Central Baptist Church of Miami, Florida, Incorporated, Miami, Florida, and that he has read the foregoing affidavit and is acquainted with the facts therein set forth and the same are true.

s/ Miller Walton

Miller Walton

Sworn to and subscribed before
me this 27 day of April 1967.

s/ Elizabeth A. Smith

Notary Public
State of Florida at Large
My commission expires:
April 8, 1969

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing affidavit was served by mail upon Thomas C. Britton, Esquire, Dade County Attorney and Attorney for the Defendants, 1626 Dade County Courthouse, Miami, Florida 33130, Attention Stuart L. Simon, Esquire, this 28th day of April, 1967.

HERBERT S. SAWYER

Of Counsel